U.S. SMALL BUSINESS ADMINISTRATION
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OFFICE OF CHIEF COUNSEL FOR ADVOCACY

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
Revision of Part 22 of the	)	CC Docket No. 92-115
Commission's Rules Governing	)	
the Public Mobile Service	)	

Comments of the Chief Counsel for Advocacy of the United States Small Business Administration on the Notice of Proposed Rulemaking

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EXECUTIVE SUMMARY

The mobility of Americans, the constant battles with increasing traffic, the need to stay competitive through the provision of improved service, and the growth of so-called "edge cities" has contributed to the skyrocketing use of wireless mobile communication devices. One primary player in this booming field (growth rate averages 15% per year) is the paging operator.

A paging system is one of the oldest wireless communication services. Paging is a one-way calling system which has evolved from the transmission of the simple "beep" into a reasonably sophisticated message delivery device. There are an estimated 11.5 million subscribers to some 1,500 companies supplying paging services. Their revenue exceeds 3 billion dollars a year. The vast majority of paging operators are small businesses with market share sufficiently low that they cannot be tabulated.

On June 12, 1992, the Federal Communications Commission (FCC or Commission) released a notice of proposed rulemaking to revise the regulations governing public mobile land services. The proposal represents the first comprehensive review of the regulation of the cellular telephone and paging industries since 1983.

The proposed overhaul is designed to streamline and update the regulations given the changes in the industry and technology.

Pursuant to the Regulatory Flexibility Act, the Commission examined the potential impact that these changes will have on small paging operators and determined that they will be significant albeit beneficial. The Office of Advocacy requests that the Commission, in its final regulatory flexibility analysis also examine alternatives to those portions of the proposed rulemaking that may have deleterious effects on small paging systems.

The Office of Advocacy supports the FCC's effort to update and simplify the licensing regime for paging systems. The Office of Advocacy also concurs that many of the changes will be beneficial in reducing the regulatory burden on small paging systems. However, the Office of Advocacy is troubled by certain proposals will speed the issuance of licenses but may erect barriers to the construction, expansion, and operation of small paging systems.

The Office of Advocacy opines that the Commission needs to reexamine its first come, first served licensing procedure especially in the context of random selection for mutually exclusive applications. Taken together, these two procedures are likely to create an even greater incentive for speculative filings by application mills. The clients of these mills are less interested in providing a service to the public than

obtaining a cash settlement from companies that have a serious intent to provide paging services.

The Office of Advocacy recommends that the Commission enhance its anti-trafficking protections. Prohibitions on quick profits from speculation will dampen the enthusiasm of application mills for paging licenses. In addition, these protections will reduce warehousing of spectrum (another issue of concern to the FCC). Even if the Commission does not adopt the suggestions on anti-trafficking, the Office of Advocacy requests the FCC to consider retaining comparative hearings for licensees seeking to expand their paging systems. Under the new processing regime, the comparative hearing (which is retained for license renewal) may be the only viable means for a small paging operator to obtain sufficient channel capacity to expand.

The Office of Advocacy also is concerned by the Commission's efforts to solve its paperwork burdens on the backs of its licensees and, in particular, small businesses. The FCC proposes to require all Part 22 filings be made on microfiche. This is an added burden both in cost and time (a burden that can mean the difference between being a lottery contender or winning a license outright). The Commission must examine alternatives to alleviate these onerous paperwork requirements, either through its own optical scanning of documents into a computer or the hiring of its own micrographic contractor (presumably at rates

significantly lower than that available to the typical paging system).

The Office of Advocacy also does not support the Commission's conditional license proposal. The Commission staff, not licensees or potential licensees, must enforce prohibitions against interference. Furthermore, the FCC proposes to retain the authority to demand cessation of operations without a hearing if interference in violation of the license occurs. Investors will be very chary about contributing capital to an operation that can cease functioning at any time based on nothing more than one accusation.

Finally, the Office of Advocacy believes that the Commission must seek better alternatives to prevent the warehousing of spectrum than its proposed prohibition on multi-frequency transmitters. These transmitters offer substantial technical and economic benefits to all paging operations but especially to small paging systems.

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I. *Introduction*

As advances in technology make it easier for Americans to move anywhere and stay in contact with their businesses, the demand for such services seems to grow exponentially. At first, long-distance telephone service through wires and then via satellite seemed to satisfy our needs for instant communication. But the micronization of technology emanating from the space program turned fantasy into communications fact. Companies entered the fray gleefully first with poor radiotelephones (usually seen on limousines with their swept-back wing antennae), then with beepers, and finally with cellular telephone services that can transform a car or boat into a moving office. It seems the greater mobility the greater the number of devices are needed to remain in constant communication. The next generation of

technology promises communication devices akin to those on Star Trek: The Next Generation.[1]

The dreams and ambitions of scientists and entrepreneurs are tempered by an undeniable fact -- the amount of electromagnetic spectrum available for wireless telecommunications is limited. All of the wireless technologies employ radio waves[2] and their use is strictly allocated by the Federal Communications Commission (FCC or Commission) pursuant to the Federal Communications Act of 1934.[3]

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[1] The communication devices on the original Star Trek are to current or soon to be implemented technology, *see generally* In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Service, Gen. Docket No. 90-314 and ET Docket No. 92-100, Notice of Proposed Rulemaking (Aug. 14, 1992), what the ENIAC is to the personal computer -- an antiquated remnant of obsolete technology.

[2] Wireless common carrier technologies are distinguishable from other types of communication that use radio waves. In broadcast service, only the entity that controls the license for that frequency has the authority to use it. In wireless common carrier service, the owner of the frequency offers to carry the communications of any other person interested in paying the wireless common carrier a fee. Unlike radio broadcast service, the common carrier has no ability to control the type of message sent on the radio waves.

One form of wireless common carriage is paging and paging can be called radio common carriage. Although cellular telephone service also is a form of radio common carriage, the industry distinguishes the two types of communication.

[3] 47 U.S.C. §§ 151-609. Specifically, the Act prohibits the use of radio transmission without a license from the Commission. *Id.* at § 301.

These services are classified as land mobile services and use radio signals to transmit between stationary base points and motile receiving units such as cellular telephones in cars.[4] The Domestic Public Land Mobile Radio Service (PLMR) in the FCC's Common Carrier Bureau regulates, through 47 C.F.R. Part 22 (Part 22), the licensing of these facilities. The Commission has issued some 8,600 licenses for the provision of service under Part 22. Many of these licensees, especially those providing paging service, are small businesses.

Nearly 11.5 million Americans subscribe to paging services. There are approximately 1,500 companies that provide paging service and they have revenue in excess of three billion dollars. Of these companies, only one commands a market share in excess of 10 percent and more than half the companies have market shares too small to tabulate. Thus, the vast majority of paging companies are small businesses and provide an integral service, especially in rural areas not yet served by cellular systems, to thousands of small businesses.

The prototypical paging service is that provided through pocket paging or beepers. A signal is sent to the receiving device and either a vibration or audible tone is received. The holder of the beeper is then instructed to contact a particular

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[4] Telocator Network of America v. FCC, 691 F.2d 525, 527 (D.C. Cir. 1982).

telephone number for a message.[5] In certain systems, a more detailed message may be transmitted obviating the need to make telephone contact. Licenses have set terms and can be issued to single entities or to multiple users. The multiple users can share either transmission services or base station operations.[6]

The rapid growth of paging and cellular telephone services (estimated growth is approximately 15 percent per year) has led to an substantial increase in the number of license applications. This has taxed the capacity of the FCC to issue licenses with celerity. In addition many of the rules are obsolete or not necessary because of technological advances or the changing status of the industry. The Commission has determined, and the industry appears to agree,[7] that modifications to Part 22 are necessary.

As a result of this finding, the Commission instituted the current rulemaking, In the Matter of Revision of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115

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[5] Telocator Network of America v. FCC, 761 F.2d 763, 764 (D.C. Cir. 1985).

[6] *Id.* at 764-65.

[7] On September 18, 1992, a historic joint meeting between Telocator Network of America (the trade association representing paging companies) and the Cellular Telecommunications Industry Association took place in Washington, DC. This is the first time the two trade groups gathered together to discuss issues raised by FCC regulation of their industries.

(June 12, 1992), *summarized at* 57 Fed. Reg. 29,260 (July 1, 1992) (NPRM). The Commission proposes a complete revision to Part 22; some of the changes are relatively minor technical amendments; others represent significant and substantial modification to current practices with unknown consequences for the industry.

The FCC, pursuant to the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12 (RFA), examined the proposed rules. The Commission determined that the regulatory modifications and associated information collection requirements will have a significant economic impact upon a substantial number of small entities. The Commission found that many of these changes will be beneficial and reduce the regulatory burdens on small businesses. *Id.* at ¶¶ 24-29.

The Office of Advocacy commends the Commission for recognizing the impact that the rules may have on small businesses, especially providers of paging service.[8] The Office

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[8] The Commission does not consider local exchange carriers small businesses because they are dominant in their field. *Compare* 15 U.S.C. § 632 and 5 U.S.C. § 601(3) (small businesses are independently owned and operated and not dominant in their field). Most cellular telephone service is provided by local exchange carriers or large corporations.

The Office of Advocacy disputes the FCC's interpretation of small business. Despite our concern over the definition of small business and its potential impact on the small local exchange carriers that provide cellular service, the Office of Advocacy's discussions with industry representatives leads us to conclude [redacted]

of Advocacy also supports many of the proposed changes because they will result in a more understandable and less burdensome regulatory regime. However, the Office of Advocacy believes that the Commission's initial regulatory flexibility analysis overlooked a number of areas in which its proposed modifications could have a deleterious effect on the ability of small paging companies to offer low-cost and reliable service to their thousands of small business customers.

I. *First Come, First Serve Application Processing*

Current Commission regulations for obtaining a license to build a paging system are convoluted. Much depends upon the frequencies for which the applicant is interested, the amount of opposition, and whether a mutually exclusive application, i.e., more than one application for the same frequency, has been filed.

In the simplest case, an application is filed with the Commission and no competing applications for the same frequency are filed. The PLMR staff checks it for completeness and, if complete, issues a notice of the pending application. Parties then have thirty days to submit objections to the issuance of the

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[8](...continued)
services. Therefore, these comments will focus on the particular problems of the paging industry.

application. The Commission then can authorize the issuance of the license if, upon consideration of the application and objections, the FCC finds that the issuance of the license will be in the best interests of the public.

If mutually exclusive applications are filed, then the Commission will use random selection to determine the licensee from all acceptable applications. However, currently licensed paging systems that are interested in expanding, either through the construction of more base stations or frequencies, and face mutually exclusive applications are entitled to seek a comparative hearing.

In either case, the license issues for a specific term. Licensees may seek renewal of their applications through the same procedures adopted for the grant of an initial license.

A. Application Mills and Trafficking

The Commission only proposes to modify its rules concerning the issuance of licenses when mutually exclusive applications are filed. In general, the first filed application will be awarded the license. If more than one application is filed on the same day,[9] then a random selection process for all such applications

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[9] The Commission specifies procedures for determining the filing date. Proposed § 22.509(c).

occurs. The first selected application is awarded the license and all other applications excluded by it are dismissed. Any applications that are no longer exclusive by reason of the dismissal also may be granted.[10] This process goes on until all licenses are awarded. Proposed § 22.509. The Commission still authorizes the conduct of a comparative hearing if one of the mutually exclusive applications is for renewal. *Id.*

The Office of Advocacy agrees with the Commission that this procedure is less cumbersome than comparative hearings and provides greater certainty among applications than a random selection process that ignores the date of filing for the license. Early applicants will be able to ensure themselves of the opportunity to build a paging system. Mutually exclusive applicants will not have to spend exorbitant sums on legal and technical experts to battle through a comparative hearing. However, the reduction in transactions costs may unintentionally

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[10] Dismissal of certain applicants, after a random drawing, may mean that other applications are no longer mutually exclusive. For example, if applicant A is mutually exclusive with applicant B and applicant B is mutually exclusive with applicant C but C is not mutually exclusive with A, then a random selection granting a license to A also removes any mutual exclusivity with respect to C. Under the proposed rules, the Commission is entitled to award licenses to A and C.

increase the volume of applications[11] and decrease the ability of small systems to expand their business.

The combination of first come, first serve and random selection present unique opportunities for so-called application mills. Application mills are enterprises, which for a fee, will submit applications to the FCC. The mills use efficient processing to file dozens or even hundreds of applications often far more quickly than companies currently involved in the paging business. Thus, these mills can create situations in which their applications will be at the Commission first and they will often have more of them filed (albeit not for the same specific individuals). The use of the modified random selection procedure also will increase the likelihood that an applicant may obtain a license and increase dramatically the incentive for application mills to redouble their filing efforts. Their raison d'etre is not to build systems; rather it is to obtain a cash settlement either through withdrawal of the application or sale of the license to an already extant operator.

The Office of Advocacy is troubled by the potential problems that application mills may have for legitimate small paging operations. Application mills will force them to expend scarce

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[11] The Commission need only examine the problems created by lotteries for multipoint distribution systems to realize that the FCC, in offering this proposal, is not learning from history but repeating it.

resources to eliminate mutually exclusive applicants that have no intention of building systems. Or they may have to purchase these licensees at inflated fees from lottery winners. The situation is exacerbated by the fact that all other mutually exclusive applications other than the lottery winner is dismissed.

In the case of a small paging company that needs the license to expand service, it may not have the resources to obtain the license from the mill applicant lottery winner. A larger competitor[12] may do so thereby stunting the growth of the small paging company simply due to the regulatory regime and the luck of the draw. The Office of Advocacy asserts that the free market must determine winners and losers not the fortuity associated with cash payments to lottery winners. The Office of Advocacy believes that stronger protections must be imposed by the Commission against application mill abuses.

The Commission's proposed rules will allow it to examine whether the applicant actually intended to build the system for which it applied. *Id.* at § 22.139. This may be insufficient to prevent abuse by application mills. Rather, the Office of Advocacy prefers that the FCC adopt a prohibition on the resale

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[12] Larger paging companies also have the ability to plan perform long-range comprehensive planning for expansion. Small paging systems do not have that luxury and thus may be more at the mercy of stochastic events than large paging operators.

of licenses or other changes in license ownership for a set period of time. This will deter mills because their applicants will have little or no hope of a relatively quick payoff if they win a lottery.[13] The Commission must grant exemptions to this prohibition but only on the showing of appropriate business necessity, such as a company leaving the paging business or seeking additional financing.[14] The Office of Advocacy seriously questions whether application mill licensees will be able to meet that standard.

These revisions will produce a number of benefits to small businesses. First, the reduction in application from mills will enable the PLMR staff to expedite the processing of applications from legitimate operators of paging systems. Second, it will lessen the number of entrants in the lottery and improve the

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[13] To reinforce the protections against application mills, the Commission should require that licensees commence construction of their system within a specified period of time. If they do not, then the licensee would lose the authorization. This represents only a slight extension of the current proposal which would strip the licensee of authorization to operate system if the licensee does not commence the provision of service. Proposed § 22.144. The Commission should allow applicants to apply for extensions of the construction commencement date but these extensions must be given only for provable business difficulties, such as inclement weather, sudden loss of financing, etc. The Office of Advocacy doubts whether the typical mill applicant could meet this business necessity test.

[14] *Cf.* In the Matter of Amendment of Parts 1,2, and 21 of the Commission's Rules Governing the Use of the Frequencies in the 2.1 and 2.5 GHz Bands, PR Docket No. 92-180, Notice of Proposed Rulemaking, Comments of the Chief Counsel for Advocacy at 19-20 (prohibitions on amendments to MDS licenses for legitimate business decisions will not reduce trafficking).

chances that an entity truly desirous of providing paging services will obtain a license through the lottery. Third, it will assist these companies in obtaining financing because of the greater certainty associated with winning a lottery with far fewer applicants.[15]

Even if the Commission does not adopt these proposals concerning application mills and speculative license filings, the Office of Advocacy requests that the Commission maintain the availability of a comparative hearing for mutually exclusive licenses in which one licensee wishes to expand. Use of the lottery may reduce transaction costs associated with a comparative hearing but it also may eliminate the only available option for a small licensee to get sufficiency channel capacity to expand their paging system. The potential that an application mill applicant may have to go through a comparative hearing may lessen the efforts of mills reduce the number of applications, increase processing speed, and offer better chances for existing paging systems to obtain channel capacity for expansion.

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[15] In addition, the Office of Advocacy supports the joint position of Telocator and the Cellular Telecommunications Industry Association for a "market area" approach to mutually exclusive licensing.

B. Micrographic Applications

The Commission proposes to require that all applications for licenses submitted under Part 22 must be submitted on microfiche. The FCC asserts that these requirements are needed due to the lack of file space and the insufficiency of the Commission's microfiche capabilities. Despite the potential cost increases associated with micrographic filings,[16] the FCC claims that other revisions in Part 22 will reduce the overall paperwork burdens on small businesses. NPRM at ¶ 26. The Office of Advocacy disagrees with the finding of the Commission on the burdens associated with microfiche filings. Moreover, micrographic filings may have unanticipated deleterious consequences on paging systems operating in a first come, first serve licensing environment.

Costs for starting a micrography operation for a reasonably large volume user, such as a law firm specializing in telecommunications, has been estimated to be approximately $50,000.[17] Given the cost, most small paging companies will not

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[16] Current regulations only require certain filings to be made on microfiche. NPRM App. A at 7.

[17] Letter from Frank Swain, Chief Counsel for Advocacy to Yvette Flynn, Office of Management and Budget at 2 (Aug. 23, 1988).

be able to justify the expense and will seek outside micrographers to perform the work.

The micrography process, unlike typesetting, is not designed to accommodate small jobs, i.e., under 200 sheets of paper. Some micrography shops will not even perform small jobs. Others charge a minimum rate irrespective of the size of the job. There are many locations (including some states such as Wyoming) in which commercial micrography operations do not exist. Finally, even in large urban areas with significant paperwork processing needs, such as Washington, DC, the number of firms capable of doing micrography is limited.[18] Small paging companies will have difficulty in obtaining rapid, reliable, and low-cost micrography service.

This situation is exacerbated by the Commission's proposal to issue licenses on a first come, first serve basis. Speed of filing is an absolute necessity under this processing regime. Application mills, which will have sufficient volume to establish their own micrography service, and paging operators that can afford legal representation in very large urban areas such as Washington, DC, will have a distinct advantage in getting their applications to the Commission. Other paging companies may find

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[18] A quick perusal of the Washington, DC Yellow Pages reveals only 35 firms that perform micrography. In comparison, there are approximately ten times as many firms providing printing and copying services.

that their applications will not reach the FCC in time because of overnight delivery and other potential delays in the micrography service. This is especially damaging for small paging companies trying to maintain their territories against encroachment from larger companies based in metropolitan areas.

The Paperwork Reduction Act, 44 U.S.C. §§ 3501-20, was enacted to reduce the paperwork burden faced by small businesses and the RFA was passed to force regulatory agencies to consider less burdensome alternatives, including modifications to information collection requirements. The proposal in the NPRM does neither.

If the FCC faces paperwork difficulties, it must revise its procedures to alleviate them. Transferring the burden to small businesses is not acceptable and other alternatives need to be examined. One possibility is for the Commission to optically scan all relevant application information and put it on a computer or compact disk. If the Commission can do this for its rulemaking dockets, some of which run to more than 10,000 pages, then the Commission cannot gainsay its capacity to do it for Part 22 applicants. Or the FCC can seek a private contract to provide more micrographic services and adjust the filing fees to cover those costs. Due to the volume of services required, the FCC will be able to obtain micrographic services at rates substantially lower rates than most small paging companies and

this will translate into rather small increases in filing fees. Both proposals avoid the potential problems associated with first come, first serve filing and delays associated with the transfer of paperwork to microfiche. We request that the Commission seriously consider these alternatives to solve its paperwork problems before imposing even more burdens on small paging operators.

II. *Conditional Licenses*

Current FCC regulations require Part 22 licensees to operate on an interference-free basis. 47 C.F.R. § 22.100. A critical element in the processing of Part 22 applications is the review of the interference analysis submitted by the prospective licensee. *Id.* at §§ 22.32, 22.35. The FCC staff verifies the analysis to ensure that interference will not result. This verification increases the time to process applications by 50%. NPRM at ¶ 11.

To expedite the processing of applications, the FCC proposes to require a strong self-certification by the applicant that it meets the non-interference requirements. The license is then granted on a conditional basis that interference not occur during the term of the license. If it does, the Commission retains the right to suspend operations of the licensee without a hearing

until the interference is eliminated or reduced to otherwise acceptable levels. *Id.*

To be sure, a certification statement by the applicant will alleviate much of the engineering analysis that the FCC staff must perform. This will be beneficial to the extent that it enables licensees to provide paging service on a more timely basis. However, there are potential drawbacks to the self-certification that raise serious concerns on the overall utility of the certification.

First, the certifications filed by the applicants may not meet appropriate technical standards. Thus, the certifications may not provide the information needed by the Commission to determine the acceptability of the application. Second, the proposal will shift the analytical requirements to other applicants or operators to ensure that the proposed system does not pose an interference problem. Not only will they have to perform their own analysis but expend precious capital in contesting the grant of the license. *See* Proposed § 22.130. The Commission must not rely on the small businesses to perform the FCC's regulatory oversight. The Office of Advocacy believes that certification process is fraught with potentially significant costs that outweigh any benefits from a reduction in the staff workload.

Any interference that does occur under the conditional license proposal can result in an FCC order to cease operations. Investors will be very reluctant to finance paging (or for that matter any other PLMR service) unless they have some assurances that their investment is protected through the generation of cashflow. Immediate cessation of operations and the resultant extinguishment of cashflow upon a complaint of interference represents a substantial barrier to acquiring capital. This will dampen the ability of small paging operators to expand their service and limit its availability in non-urban areas.

Rather than looking at means to reduce the financing opportunities for paging and other PLMR services, the Commission must examine methods for increasing investment in the industry. The FCC must not adopt the conditional license grant and immediate cessation rule because determination of success or failure in the industry will be placed in the regulatory arena not the marketplace; investors are far more comfortable with the exigencies of the marketplace than the vagaries of regulation. Investors are more likely to risk their capital in the freely operating market than one in which regulatory intervention, based on simple accusation, can play a dominant role in the success or failure of a business.

III. *Multiple Frequency Transmitters*

Current Commission regulations permit the installation of multi-frequency transmitters at an installed site where two or more channels are authorized. NPRM App. A at 12. The Commission proposes to eliminate this by requiring a separate transmitter for every assigned channel at each location. Proposed § 22.507. The FCC contends that the prohibition will encourage a more efficient use of the spectrum and deter the warehousing of spectrum.[19] NPRM App. A at 12.

The Office of Advocacy agrees with the Commission that inefficient use of the limited amount of spectrum must be prevented. However, the Commission must examine other alternatives that do not infringe on the legitimate use of multi-frequency base station transmitters.

Multi-frequency transmitters have a number of useful functions. First, operators may employ them to offer both local and regional or nationwide paging capability. The operator can switch among the two transmitters to provide optimal service.

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[19] The Office of Advocacy agrees with the arguments raised by Telocator that this prohibition can be easily and inexpensively elided. Thus, the Office of Advocacy is not sanguine that the Commission will accomplish its stated purpose of preventing warehousing.

Second, multi-frequency transmitters enable paging companies to offer enhanced services such voice or text (alphanumeric) paging. Third, they may permit increased use of frequency sharing. This represents an extremely effective mechanism for small paging systems to increase coverage, reduce inefficient use of transmitters, and lower costs to subscribers. The Commission's ban on multi-frequency transmitters ultimately will harm small paging companies in their efforts to provide optimal service to their numerous small business customers.

The Office of Advocacy believes that these beneficial uses of multi-frequency transmitters can be retained while still deterring the warehousing of spectrum. Specifically, the Commission has a number of policies, which if properly enforced, will prevent warehousing while still permitting the legitimate use of multi-frequency transmitters. Among these policies are cancellation of the license if no service is provided on the channel for more than 90 consecutive days and various anti-trafficking standards (the Office of Advocacy's proposals on this issue will enhance the Commission's fight against warehousing). Before terminating the ability of paging systems to use multi-frequency transmitters, the FCC must examine less burdensome alternatives.[20]

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[20] To the credit of the Commission, it recognizes the potential adverse effect the proposed prohibition may have on paging systems and is willing to examine less burdensome alternatives. NPRM App. A at 12. The analytical framework of

(continued...)